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# Humor, the Law, and Judge Kozinski's Greatest Hits\*

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## I. INTRODUCTION

A couple of months ago a friend and I were discussing our law school experiences. Although we attend different law schools, our three year journeys have been surprisingly similar. For instance, we both thought it ironic that legal writing classes attempt to teach students to write clearly and concisely while other law classes require students to read cases that are neither clear nor concise.<sup>1</sup> We thought one of the best ways to learn good legal writing would have been to see good legal writ-

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\* I know a snappy title is called for here, especially one containing a colon. Unfortunately every title I tried only muddled the theme of this Comment. Hopefully, there are enough quips in the body of the comment to compensate for the lack of snappiness in the title. For an example of a humorless note with a snappy title containing a colon, see David A. Golden, Note, *The Ethics Reform Act of 1989: Why the Taxman Can't Be a Paperback Writer*, 1991 B.Y.U. L. REV. 1025 (proposing a constitutional paradigm for analyzing federal conflict of interest laws and concluding that the Taxman should indeed be allowed to be a Paperback Writer). While this citation appears self-serving, good form seems to require an author to cite his or her most recent publication within the first five footnotes of a new article. See, e.g., Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. \_\_\_, \_\_ n.2 1992 (forthcoming) (citing FREDERICK M. GEDICKS & ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE (Contributions to the Study of Religion No. 32, 1991)). Professor Gedicks is hardly alone in this practice. I single him out only because he has a good sense of humor. At any rate, it's too late now for him to change my grade in his class.

\*\* In a normal world, my name would go here. However, Law Review tradition forbids me from listing my name anywhere but at the end of this Comment (unless the listing is in conjunction with a citation to some previous work of mine. See, e.g., Golden, *supra* note \*). Such rules, however, do not prevent me from expressing thanks to David Griner, Editor-in-Chief of the University of Georgia Law Review, for his comments on an earlier draft. Also, my thanks and apologies to Mrs. Karen Wakeford, my high school Latin teacher. See *infra* note 2.

1. In fact, legal writing might be the only class where clear writing is actually rewarded. In most other classes writing *quickly* is considerably more important than writing clearly. This is so because a law exam is usually a three-hour attempt to fill as many blue books as possible. As an illustration, my friend lamented that his lowest grade in law school resulted from his failure to recopy § 1 of the Sherman Anti-trust Act at the beginning of an open book exam. Instead he devoted his time to analyzing issues far more complex than copying a statute word-for-word into a blue book. He learned his lesson.

ing more often. Instead, the cases we often encountered in casebooks were hardly the epitome of judicial clarity.

Undoubtedly, it is not the design of law professors to promote poor legal writing through their reading assignments. Professors merely use the cases that are available. Unfortunately, few cases ever appear in a casebook in full form. They are always edited. The casebook editing process involves removing all or part of such boring details as the parties in the case, the underlying facts, the controlling law, the conclusion of the court, and the reasoning behind the court's decision. In fact, rarely a day goes by in law school that a student doesn't hear a comment from a professor somewhat along the lines of: "Well, it may not be apparent in the edited version of *Marbury* in your casebook, but the case actually concerned judicial review."

In addition to editing cases, casebook editors feel compelled to use as many hundred-year-old cases as possible. While I'm sure there are some brilliant hundred-year-old opinions in existence, it seems that, as a whole, modern judges do a better job of being clear and concise.<sup>2</sup>

Many judicial opinions are unclear because the judge intended to be unclear. Through ambiguity a judge is easily able to change his or her position on an issue at a later date. It is easy to change your position if you never make the position clearly known. However, this does not help the law student in search of black letter law.

Finally, many judicial opinions may be poorly written because some judges are poor writers.<sup>3</sup> I'm sure many judges would agree that there are a few in their ranks who are not good writers. Judges are in a very difficult position because so much of what they write is published. Thus, any shortcoming is in the public's plain view.<sup>4</sup>

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2. This may be because judges of the 1980s and 90s are not as prone to use Latin as judges of the 1880s and 90s. It is a firmly established legal maxim that one should always use a Latin word even when a perfectly good English word or phrase exists. Firmly established legal maxims are tough to ignore. See, e.g., *habeas corpus* (to have a body), *sui juris* (old enough to sue a juror), *nolo contendere* (I did it, but I don't want to argue about it), *in personam* (in person—as in "I saw Elvis *in personam*."), *in forma pauperis* (to look poor—as in "Greg must be down on his luck, the bank just foreclosed on his house and now he is *in forma pauperis*.").

3. Maybe these judges were very fast writers in law school. See *supra* note 1.

4. As if this isn't bad enough, judicial opinions, especially Supreme Court

Because of the daunting upstream swim a clear judicial opinion faces en route to law students, it is always a pleasant surprise to read an opinion in a casebook that is memorable for its writing style as well as for its substance. One writing style that is consistently memorable is one that uses humor.<sup>5</sup> This Comment advocates the use of humor in judicial opinions in the hope that more such opinions will find their way into casebooks. Of course, not everyone shares my view.

## II. HUMOR AND THE CRITICS

This Comment is not intended to be an exhaustive rebuttal of the criticisms of judicial humor.<sup>6</sup> Such an attempt would be futile since the loudest critics of judicial humor are most likely Humor Impaired.<sup>7</sup> Accordingly, it would be impossible to convince such critics of the value of something that they do not see. However, I will take a brief look at the arguments against judicial humor using a note that typifies the traditional attack.<sup>8</sup>

opinions, are a prime target for every know-it-all law review member to use in crafting his or her student note. In a student note, a law student, with a whole nine months of law school under his or her belt, selects a judicial opinion and then proceeds to show how the judges who actually read the briefs and heard the oral arguments in the case completely botched the issue. The student then illustrates the "proper" mode of analyzing the issue. The student's argument, interestingly enough, usually sounds strikingly similar to the dissenting opinion in the case.

5. My proposition is that humor makes things more memorable. In support, I cite a personal experience: When I was in the eighth grade, I took a required Georgia History course. The only thing I remember from the class is an assignment that required each member to write a poem about a Georgia river. My friend Walter did not remember the assignment until the due date. When it was his turn, he presented the following poem:

Men Work Hard  
Hauling Pig Lard  
Up and Down  
To and Fro  
On the Savannah

I got an A on my poem, Walter got a D. It should have been the other way around. Walter's poem remains one of my favorites. I remember nothing about my poem. In fact, I can't even remember my river.

6. I'll just take a few cheap shots and move on.

7. For a more detailed explanation of humor impairment and some of the technology available to the Humor Impaired, see Dave Barry, *Finally! Help for the Humor Impaired*, CHI. TRIB., June 11, 1989, at 51. (Barry describes shorts equipped with radio-controlled electrodes to be worn by the Humor Impaired so that those with a sense of humor can signal them, via electric shocks, when to laugh. Barry also includes an example of a humorous article closed-captioned for the Humor Impaired).

8. Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS

### A. *The Poor Loser*

The typical attack on judicial humor characterizes the offending judge as a Machiavellian, insensitive lout who enjoys abusing the downtrodden.<sup>9</sup> These critics feel that parties to litigation become sacrosanct by stepping onto the courtroom floor. No matter how egregious or foolish a litigant's conduct becomes, according to critics, judges should be powerless to address the absurdity of such conduct in an opinion since pointing out such conduct may obviously be embarrassing to the litigant.<sup>10</sup> However, instead of allowing a judge to vent a little annoyance with a quip or two in an opinion, perhaps the losing party would prefer that the judge grant the opposing party's Rule 11 motion.

Relying on the losing party's opinion of judicial humor is somewhat suspect. Rather than resenting the humor, the losing party may be in a bad mood because it lost. Consequently, the losing party is not going to like anything the judge has to say, humorous or otherwise, unless it reinforces or vindicates its position.<sup>11</sup> On the other hand, the winning party probably couldn't care less about the humor in an opinion.

Finally, how many litigants even read the final opinion? After all, judicial opinions are really not written for the parties so much as for posterity. If the present litigation was the only concern, a simple thumbs down from the judge would let the plaintiff know that he or she lost.

### B. *The Public Doesn't Want It*

One critic argued such television shows as *L.A. Law* and *Perry Mason* "depict humor only outside the courtroom" and thus "our society expects a very *high* degree of seriousness from

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L.J. 175 (1989) (note the snappy title and the colon).

9. "People should enjoy a good laugh, but not in the traumatic and expensive context of litigation." *Id.* at 179. "However amusing someone else's dispute may be, it is anything but funny to have one's own right to property, liberty, or good reputation determined by a judge . . . ." *Id.*

10. "The ultimate propriety of judicial humor really depends on its *effect*. A judicial humorist may not intend to ridicule litigants, but if the humor has that effect, then intent is irrelevant." *Id.* (emphasis in original).

11. Has anyone ever noticed that no one asks the *losing* quarterback after a Super Bowl what his plans are?

its judiciary."<sup>12</sup> Accordingly, the critic believes that this illustrates the public's agreement with his assessment of judicial humor as "an *enfant terrible* that, like any undisciplined child, amuses its inordinately tolerant judicial 'parents' at the expense and dismay of the rest of society."<sup>13</sup> It is remarkable to think that one can ascertain the public's expectation of law from the *Perry Mason* series—a show in which the prosecutor, Hamilton Burger, is the legal equivalent of the Washington Generals.<sup>14</sup> This is much the same as assuming that the public's expectation of the law of contracts may be derived from *The Little Mermaid*.<sup>15</sup>

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12. Rudolph, *supra* note 8, at 179 (emphasis in original).

13. *Id.* at 178.

14. Those unfamiliar with the Washington Generals, should look under the topic of "Losingest Basketball Team" in the *Guinness Book of World Records*. Like Burger, the Generals have the same opponent night after night—the Harlem Globe Trotters. For additional commentary on the "realism" of the *Perry Mason* series, see James D. Gordon III, *Humor in Legal Education and Scholarship*, 1992 B.Y.U. L. REV. 313, 318 n.35.

Of course the commentator did state that "the reader will notice a fair amount of humor in this Note." Rudolph, *supra* note 8, at 179 n.22. Maybe buttressing his argument with *Perry Mason* reruns is one example. Somehow I doubt it. See *supra* note 7 and accompanying text.

15. For those unfamiliar with this Disney classic, the story centers around a contract between the Little Mermaid (Ariel) and the Sea Witch (Ursula). Ariel and Ursula entered into a contract (Contract) in which Ursula was to give Ariel a pair of legs in exchange for Ariel's voice. However, Ariel would become the possession of Ursula if the Prince, the object of Ariel's desire, did not kiss Ariel within three days of the signing of the Contract. Early in the three-day period, things looked positive for Ariel. However, as the Prince was poised to kiss Ariel, Ursula disrupted Ariel's connubial quest by tipping over their rowboat. After this close call, Ursula changed into a woman and used Ariel's voice to capture the Prince's affections long enough for the three-day period to expire. As Ursula proceeded to take Ariel, King Triton, Ariel's father, flung a lightening bolt at Ursula to prevent enforcement of the Contract. Using the Contract as a shield, Ursula deflected Triton's lightning bolt, exclaiming, "You see, the Contract is legal, binding, and completely unbreakable, even for you." Under the *Perry Mason/L.A. Law Public Expectation Theory*, society would applaud the enforcement of the Contract against Ariel since in the movie the Contract was indeed binding.

Although Ursula did not live long enough to see the appeal, in a suit brought by her estate against Ariel for breach of contract, the appellate court rejected the "lightning bolt test." Instead the court of appeals concluded that the Contract was voidable by the minor Ariel, that Ursula breached her implied good faith promise not to interfere with Ariel's performance, and that the Contract was void as being contrary to public policy. We can conclude that even though it correctly reflects the law, this outcome is contrary to public expectation since this part of the story never made it into the movie.

### C. Amend the Code? Huh?

In the most amusing part of his criticism, one commentator actually suggested amending the ABA Code of Judicial Conduct to ban humor in opinions.<sup>16</sup> This new provision would read:

The use of humor in a judicial opinion is *inappropriate* if:

- (A) a reasonable litigant would feel that he or she had been made the subject of amusement, or
- (B) opinion utility would be compromised by the humor.<sup>17</sup>

The commentator goes on to state that "the actual meaning of 'opinion utility' is intentionally vague so that local jurisdictions will have discretion to impose their own notions of judicial decorum on an ad hoc basis."<sup>18</sup>

This is great! We endow our judges with power to adjudicate disputes involving life, liberty, and property. But we stop right there! We will tolerate no wit in an opinion. We cannot trust judges to use their discretion in anything so life and death as humor. And we will have absolutely no "compromised opinion utility" (whatever that is). We have standards!

Whether a judge violates this proposed judicial code would be determined by a "reviewing commission."<sup>19</sup> I can just see this panel at work:

CHAIRPERSON: I'm sorry, when the judge called the defendant a clown she was holding the poor guy up to ridicule. I'm going to have to vote to disbar the judge.

COMMISSION MEMBER: What? The defendant *is* a clown. He had on a big rubber nose, oversized shoes, and a red wig when he robbed the bank. The defendant was holding himself up to ridicule. The judge was just noting the facts; it's her job.

CHAIRPERSON: There *you* go ridiculing this poor criminal. I'll tolerate none of your levity. I'll see that you're disbarred.<sup>20</sup>

To be sure, I am not advocating the placing of "kick me" signs on litigants' backs as they come into the courtroom. While

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16. I AM NOT MAKING THIS UP. See Rudolph, *supra* note 8, at 195.

17. *Id.*

18. *Id.*

19. *Id.* at 197.

20. Perhaps the panel could adopt a "grin test." That is, if a reasonable person is compelled to smile broadly enough to reveal six or more front teeth, the opinion is inappropriately humorous.

this may be funny to some, it is obviously inappropriate. What I am arguing is that the proposed amendment is no improvement. I assert that unless a judge's conduct violates Canon 3 of the ABA Code of Judicial Conduct,<sup>21</sup> no further inquiry into a judge's actions or opinions is warranted.

### III. JUDGE KOZINSKI'S BEST

Instead of ascertaining the public's approval of judicial humor from *Perry Mason* reruns, a better alternative might be to look at actual examples of effective judicial humor and let the public decide for itself. This Comment attempts to do just that. To do this, I have focused on the writings of Judge Alex Kozinski of the Ninth Circuit Court of Appeals.

I picked Judge Kozinski for a reason: Although he has been on the bench only a few years, he's had quite an impact on the legal community, in no small part because people actually read his opinions. Readers of Judge Kozinski's work are not limited to the people who have to read it—the parties in the case, law geeks, first year law review members trawling for a casenote topic etc.—but a lot of other people who have an appreciation for a pithy legal argument or a well-turned phrase. As one legal scholar recently noted, “The Kozinski paper trail is extensive. It is also laced with humor. But never is the humor unrelated to the issues raised.”<sup>22</sup> Judge Kozinski combines humor with a direct, uncluttered writing style to make his points clearly and convincingly. He proceeds from the philosophy that it's not enough to be right; a judge must also be read and remembered to have an impact.

Judicial opinions like Judge Kozinski's are one cure for the dreary casebooks I complained about earlier. In fact, through casebooks,<sup>23</sup> classroom handouts and word of mouth, Judge Kozinski's opinions have begun to make their way into the law schools—another way to make an impact. Countless law students across the country are discovering that there is, after all, life in the law upon reading Judge Kozinski's ode to the parole

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21. “A judge should be patient, dignified, and courteous to litigants . . . .” CODE OF JUDICIAL CONDUCT, Canon 3-A(3) (1984).

22. Norman Karlin, *It's a Judge's Duty to Stir up Controversy on Legal Issues*, L.A. DAILY J., Sept. 24, 1991, at 7.

23. See, e.g., EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 528, 786, 1052 (1991); JOHN D. CALAMARI, JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CASES AND PROBLEMS ON CONTRACTS 294 (2d ed. 1989).



evidence rule in the case of the greedy law firms,<sup>24</sup> or his Cloud Cuckooland opinion, in which he criticizes—with all the subtlety of a jihad—the newfangled tort of maliciously refusing to admit you have a contract.<sup>25</sup>

However, classifying Judge Kozinski merely as a humorous jurist would be a gross mischaracterization. A judicial opinion designed solely to invoke a laugh would be as substantively deficient as a poem about pig lard.<sup>26</sup> Although the opinion would be memorable, it would have no impact on the law. Even though the typical Kozinski opinion contains lines that will make the reader laugh out loud, the opinion is always grounded in legal substance, not on jokes.<sup>27</sup> In fact, while Judge Kozinski is adept at making people laugh, his real talent lies in making enigmatic points of law clear and quotable. To illustrate this point, I have excerpted more than just those Kozinski quotes that are outrageously humorous. I have also included a number of quotes that subtly use wit or satire to articulate complex points of law.

With this in mind, please read the following excerpts (which are organized topically for easy reference), at your convenience. Additionally, you might ask yourself this question: Am I a bright, with-it kind of person with a superior wit and intellect who enjoys this type of clear, cogent writing in judicial opinions (i.e., did I laugh at any of the quotes) or am I a dullard (i.e., do I think that Judge Kozinski needs to go back to school to learn some of those long words and Latin phrases that are conspicuously absent from his opinions)? Finally, when you finish reading the quotes, please fill out the survey at the end so that we can scientifically<sup>28</sup> ascertain the public's true opinion of judicial humor.

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24. See *infra* text accompanying note 86.

25. See *infra* text accompanying note 51. Law professors, too, seem to like his opinions—if only to explain how patently wrong they are.

26. See *supra* note 5. Although I like the poem, I admit it is a bit lacking in substance.

27. In short, the type of legal writing the Humor Impaired hate with a passion—or rather would hate with a passion if they could only recognize humor and if they had a passion with which to hate it.

28. I.e., without using *Perry Mason*.

A. *Great One Liners*

In law, as in life, two wrongs add up to two wrongs, nothing more.<sup>29</sup>

Saying the same thing twice gives it no more weight.<sup>30</sup>

But courts do not sit to compensate the luckless; this is not Sherwood Forest.<sup>31</sup>

In my view, this is a poor bargain. We will come to grief as a nation if we continue the current trend of robbing Peter to pay Paul's lawyer.<sup>32</sup>

It's not easy to describe the many ways in which the panel's opinion conflicts with those of every other federal court to have applied section 924(c), but I will try.<sup>33</sup>

Personal initiative, not government control, is the fountain-head of progress in a capitalist economy.<sup>34</sup>

If, as the metaphor goes, a market economy is governed by an invisible hand, competition is surely the brass knuckles by which it enforces its decisions.<sup>35</sup>

There is not much one can really say about this line of reasoning, except that it will persuade only those who are already persuaded.<sup>36</sup>

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29. *Cubanski v. Heckler*, 794 F.2d 540, 546 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc), *vacated as moot sub nom. Bowen v. Kizer*, 485 U.S. 386 (1988)).

30. *Hammer v. Gross*, 932 F.2d 842, 852 (9th Cir. 1991) (en banc) (Kozinski, J., concurring).

31. *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 798 (9th Cir. 1990) (Kozinski, J., dissenting).

32. *United States v. Fidelity and Deposit Co.*, 895 F.2d 546, 554 (9th Cir. 1990) (Kozinski, J., dissenting in part).

33. *United States v. Phelps*, 895 F.2d 1281, 1286 (9th Cir. 1990) (Kozinski, J., dissenting).

34. *United States v. Syufy Enters.*, 903 F.2d 659, 673 (9th Cir. 1990).

35. *Id.* at 663.

36. *United States v. Aichele*, 941 F.2d 761, 769 (9th Cir. 1991) (Kozinski, J., dissenting in part).

The fundamental premise of laches is that those who sleep on their rights surrender them; if you snooze, you lose.<sup>37</sup>

... AIG's lawyers sat around contemplating their navels for two and one half years while the Bank was struggling to build up its good will.<sup>38</sup>

Every market has its dreamers and its crooks. Occasionally, they are one and the same.<sup>39</sup>

The rational basis test is, more or less, a judicial rubber stamp.<sup>40</sup>

Precedent joins common sense.<sup>41</sup>

But, as this case shows, a crafty lawyer can piece together a series of irrelevancies into a mosaic that juries and judges will find compelling.<sup>42</sup>

Gone are the days when a movie ticket cost a dime, popcorn a nickel and theaters had a single screen: This is the age of the multiplex.<sup>43</sup>

We answer unequivocally: yes and no.<sup>44</sup>

Mules seldom have a viable defense, generally having been corralled red-hoofed with large quantities of illegal drugs at or near the border.<sup>45</sup>

Wise or not, a deal is a deal.<sup>46</sup>

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37. *American Int'l Group v. American Int'l Bank*, 926 F.2d 829, 835 (9th Cir. 1991) (Kozinski, J., dissenting).

38. *Id.* at 838.

39. *In re Brentwood Sec., Inc.*, 925 F.2d 325, 330 (9th Cir. 1991).

40. *United States v. Sahhar*, 917 F.2d 1197, 1201 n.5 (9th Cir. 1990).

41. *Grunwald v. San Bernardino City Unified Sch. Dist.*, 917 F.2d 1223, 1230 (9th Cir. 1990) (Kozinski, J., dissenting).

42. *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 786 n.6 (9th Cir. 1990) (Kozinski, J., dissenting).

43. *United States v. Syufy Enters.*, 903 F.2d 659, 661 (9th Cir. 1990).

44. *United States v. Redondo-Lemos*, No. 90-10430, slip op. 1149, 1152 (9th Cir. 1992).

45. *Id.* at 1154.

46. *United Food and Commercial Workers Union v. Lucky Stores, Inc.*, 806 F.2d 1385, 1386 (9th Cir. 1986).

Moviemakers do lunch, not contracts.<sup>47</sup>

The Mellons partook of piscine fare; Mr. Mellon had the mahi-mahi, Mrs. Mellon the shrimp.<sup>48</sup>

In this case we must balance the rights of one individual against those of another, and individual rights against the workings of our criminal justice system.<sup>49</sup>

In the marketplace of ideas, [falsifying quotations] gives the author an unjustified monopoly.<sup>50</sup>

### B. *On Wasteful Litigation*

Discussing the California tort of bad-faith denial of the existence of a contract:

Nowhere but in the Cloud Cuckooland of modern tort theory could a case like this have been concocted. One large corporation is complaining that another obstinately refused to acknowledge they had a contract. For this shocking misconduct it is demanding millions of dollars in punitive damages. I suppose we will next be seeing lawsuits seeking punitive damages for maliciously refusing to return telephone calls or adopting a condescending tone in inter-office memos. Not every slight, nor even every wrong, ought to have a tort remedy. The intrusion of courts into every aspect of life, and particularly into every type of business relationship, generates serious costs and uncertainties, trivializes the law, and denies individuals and businesses the autonomy of adjusting mutual rights and responsibilities through voluntary contractual agreement.

In inventing the tort of bad faith denial of a contract, *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 686 P.2d 1158, 206 Cal.Rptr. 354 (1984), the California Supreme Court has created a cause of action so nebulous in outline and so unpredictable in application that it more resembles a brick thrown from a third story window

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47. *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990).

48. *Travelers Ins. Co. v. Budget Rent-A-Car Systems, Inc.*, 901 F.2d 765, 766 (9th Cir. 1990).

49. *United States v. Paris*, 827 F.2d 395, 403 (9th Cir. 1987) (Kozinski, J., dissenting).

50. *Masson v. New Yorker Magazine, Inc.*, 881 F.2d 1452, 1470 n.9 (9th Cir. 1989) (Kozinski, J., dissenting), *rev'd*, 111 S.Ct. 2419 (1991).

than a rule of law.

.....  
*Seaman's* throws kerosene on the litigation bonfire by holding out the allure of punitive damages, a golden carrot that entices into court parties who might otherwise be inclined to resolve their differences . . . .

This tortification of contract law—the tendency of contract disputes to metastasize into torts—gives rise to a new form of entrepreneurship: investment in tort causes of action. “If Pennzoil won \$11 billion from Texaco, why not me?” That thought must cross the minds of many enterprising lawyers and businessmen. A claim such as “defined” by *Seaman's* is a particularly attractive investment vehicle: The potential rewards are large, the rules nebulous, and the parties unconstrained by such annoying technicalities as the language of the contract to which they once agreed.<sup>51</sup>

The eagerness of judges to expand the horizons of tort liability is symptomatic of a more insidious disease: the novel belief that any problem can be ameliorated if only a court gets involved. Not so. Courts are slow, clumsy, heavy-handed institutions, ill-suited to oversee the negotiations between corporations, to determine what compromises a manufacturer and a retailer should make in closing a mutually profitable deal, or to evaluate whether an export-import consortium is developing new markets in accordance with the standards of the business community.

Moreover, because litigation is costly, time consuming and risky, judicial meddling in many business deals imposes onerous burdens. It wasn't so long ago that being sued (or suing) was an unthinkable event for many small and medium-sized businesses. Today, legal expenses are a standard and often uncontrollable item in every business's budget, diverting resources from more productive areas of entrepreneurship. Nor can commercial enterprises be expected to flourish in a legal atmosphere where every move, every innovation, every business decision must be hedged against the risk of exotic new causes of action and incalculable damages.<sup>52</sup>

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51. *Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 314-15 (9th Cir. 1989) (Kozinski, J., concurring).

52. *Id.* at 316 (citation omitted).

Considering an appeal from an award of attorneys' fees:

This is a case of litigation run amok. A minor dispute that long ago should have been resolved by the parties without the help of lawyers has been transformed into an attorney-fee-generating machine.<sup>53</sup>

Yet, as anyone who has dealt with the law knows only too well, a \$6000 claim is hardly worth litigating; it often costs more than that to hire a lawyer just to file a complaint. As here, the solution often adopted is to pile on a lot of big-ticket claims.

. . . By the time they were finished, they were asking for more than \$1 million, an amount more nearly worth fighting for.<sup>54</sup>

Lawsuits have become particularly inappropriate devices for resolving minor disputes. They are clumsy, noisy, unwieldy and notoriously inefficient. Fueled by bad feelings, they generate much heat and friction, yet produce little that is of any use. Worst of all, once set in motion, they are well-nigh impossible to bring to a halt.<sup>55</sup>

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Dissenting in a case affirming a jury verdict in favor of an employee who had been laid off:

But lawyers can only give clients reliable advice to the extent courts in fact do as they say. When courts overlook, stretch, riddle with exceptions or ignore legal principles, prediction becomes difficult. Indeed, it is a commonplace among lawyers that even a fool-proof case can be lost once it gets into court.<sup>56</sup>

Here the plaintiff dragged Levolor into court and presented nothing more than unsubstantiated assertions that there was an implied contract of employment. . . . What earthly good then is the statutory presumption?<sup>57</sup>

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53. *Blackburn v. Goettel-Blanton*, 898 F.2d 95, 96 (9th Cir. 1990).

54. *Id.* at 97.

55. *Id.* at 99.

56. *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 781 (9th Cir. 1990) (Kozinski, J., dissenting).

57. *Id.* at 782.

But are we potted plants? If we're going to affirm the district court when its actions are plainly contrary to the facts and the law, why bother with appellate review?

Admittedly, this is not a very important case; it is a garden variety employment dispute, much like thousands of others litigated in the courts every year. The verdict, \$137,000, is hardly astronomical by current standards, and the plaintiff, Ada Kern, surely needs the money much more than the defendant, a large, multi-state corporation. But the simple fact remains that, when the law is fairly applied to the record, Levolor is entitled to keep the money. We have a responsibility to so hold.<sup>58</sup>

Searching for the existence, and divining the terms, of an implied contract is a burdensome, time-consuming and uncertain proposition. The risk of an erroneous determination is greatly magnified, encouraging parties with weak positions—employers as well as employees—to spin the litigation wheel-of-fortune. Rational planning or a reasonable litigation strategy becomes very difficult as no one can tell even remotely how a case will be resolved once it gets into court. The ability to predict outcomes, which lay at the heart of Justice Holmes's model of the legal profession, is lost as a vocation; the lawyer ceases to be a forecaster and becomes a croupier.<sup>59</sup>

What we have here is a cheap litigation trick, honed to a fine art by contingency-fee-hungry lawyers: rummage through the opposing party's files and records until you find something that looks vaguely like your client has been afforded differential treatment, no matter how trivial or irrelevant, and then parade it before the jury as a grave injustice.<sup>60</sup>

But, as this case shows, a crafty lawyer can piece together a series of irrelevancies into a mosaic that juries and judges will find compelling.<sup>61</sup>

To say, as the majority does, that a rational jury might find that Ada Kern had a contractual right to have Levolor perform an irrelevant, hypothetical and to her unknown tabula-

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58. *Id.*

59. *Id.* at 783.

60. *Id.* at 786.

61. *Id.* at 786 n.6.

tion on the layoff tally sheet, is so contrary to common sense it does not, in my opinion, pass the snicker test. Quite aside from the substantive problems with today's opinion, one unfortunate consequence is that lawyers will be encouraged to engage in this type of scorched-earth litigation tactic; after all, you never know what triviality might impress a court and jury. This is no doubt welcome news for lawyers, but I doubt it helps the economy or that it is in the long-term interest of employees.<sup>62</sup>

The only relevant evidence here demonstrates that, had Levolor done every little thing Ada Kern claims it should have, she would still have been laid off. Where, then, is her beef?

....  
The boiling point of water is the same whether expressed as 212° Fahrenheit, 100° Celsius or 373° Kelvin. Applying a mechanical formula for converting Ada Kern's performance ratings into golf scores cannot affect her relative position in the layoff queue vis-a-vis other employees; the fact remains, she was still the least productive and most junior of the three wandmakers.<sup>63</sup>

I wonder if the rule also works the other way: when a court neglects to include damages to which a plaintiff is legally entitled, does the plaintiff have to eat the difference as long as the judge or jury might have awarded the lesser amount on a proper theory?<sup>64</sup>

\* \* \* \*

Commenting on a lawsuit over the interest on an \$8 monthly union fee, Judge Kozinski wrote:

It is over such a trifle—such a *bagatelle*, as the French would call it—that this lawsuit is brought, with all the attendant costs and burdens of modern litigation. At bottom, this is a protest action by certain teachers against a union to which they do not belong but to which they are forced to contribute financially. Their frustration is understandable, but they have

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62. *Id.* at 786.

63. *Id.* at 788.

64. *Id.* at 795 (footnote omitted).



chosen the wrong forum for resolving what is essentially a political dispute.<sup>65</sup>

I do see, however, a different kind of tyranny in this case—the tyranny of the modern lawsuit. In a dispute over interests that are, in my judgement, adequately served and in any event minuscule, the plaintiffs have managed to impose on the defendants very substantial litigation costs. Win, lose or draw, the union will have spent a substantial chunk of the funds collected and earmarked for representation. Moreover, the majority's ruling will impose on the union a burden vastly out of proportion to any benefits plaintiffs may gain by getting their \$8 a month starting in September rather than December.

We do the judicial system, and the society it serves, serious harm when we countenance such *bagatelle* litigation.<sup>66</sup>

### C. *Judicial Rulemaking*

Lamenting the failure of appellate courts to craft clear rules of law:

The majority may believe that it has reached a Solomonic solution, but, like Solomon, they may have merely reached a result that satisfies the court's own sense of equity without genuine regard for whether its ruling makes sense.<sup>67</sup>

Solomon's own reputation as a man of justice is probably overrated. His resolution of the famed maternity dispute rests on the presumption that the baby's biological mother would be concerned about the life of the baby while the other woman would readily consent to its slaughter. Does this really make sense? As the story goes, the false mother was so grieved by the loss of her own baby that she stole that of another. 1 *Kings* 3:16-28. Would a woman in that situation countenance with indifference the killing of the very infant she had stolen to assuage her grief? In lieu of engaging in careful fact finding, Solomon may simply have handed the baby over to the

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65. *Grunwald v. San Bernardino Unified Sch. Dist.*, 917 F.2d 1223, 1230 (9th Cir. 1990) (Kozinski, J., dissenting in part).

66. *Id.* at 1232-33.

67. *United States v. Fidelity and Deposit Co.*, 895 F.2d 546, 555 (9th Cir. 1990) (Kozinski, J., dissenting in part) (footnote omitted).

woman who was clever enough to see through his bluff.<sup>68</sup>

All of which is to say that Solomonic solutions may satisfy the Solomon in each of us, but do not necessarily reach the correct result. If Solomon's experience teaches anything, it is that courts must be extremely wary of adopting rules of law that satisfy the court's sense of justice but fail to take into account the realities of the dispute before them.<sup>69</sup>

Like every other court that adopts a broad and complicated rule, the majority predicts only modest consequences because of the "unique circumstances" of this case. But there is nothing unique about this case; it's a run-of-the-Miller Act dispute. I doubt that the majority's disclaimer will deter many lawyers from pushing the majority's maverick rule to the limits of its logic.<sup>70</sup>

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#### On the relationship between trial and appellate courts:

Appellate judges are fond of inventing formulas, tests and rules to constrain trial courts. Unable to participate in trial litigation directly, they gaze upon it with suspicion from a distance—a height, some would insist. The realities of the courtroom—the dozens of details that a district judge is able to absorb, assimilate and consider—escape appellate scrutiny simply because the reporter can capture only the words spoken, not the inflection with which they are delivered or the look (or absence thereof) that may accompany them. Consigned to watching the courtroom's dramas flicker by like shadows on a cave wall, appellate judges are wont to seek clarity by forcing the actors to take exaggerated, stylized steps that leave images sufficiently distinctive to be examined and reviewed on a cold record.

This faith in procedural choreography is, in my view, fundamentally flawed. Appellate courts cannot foresee all contingencies; they cannot reduce every conceivable factor to a neat formula, nor anticipate every factual nuance a district judge might grasp by being there, able to hear, speak and observe. Nor can procedural incantations fulfill the lofty aspirations appellate judges have for them. A colloquy conducted

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68. *Id.* at 555 n.5.

69. *Id.* at 555.

70. *Id.* (citation omitted).

in a rote and mechanical fashion, like a *Miranda* warning given in a disinterested tone, may look reassuring on the record but will do little to protect the rights of the accused. And, ritual has its costs; it is inflexible by nature and may as often defeat the ends it is designed to advance as serve them.

Appellate judges should be aware of their limitations. They can guide and review, but they cannot run the show. The task of safeguarding the rights of criminal defendants ultimately rests with the experienced men and women who preside in our district courts. We should let them do their jobs.<sup>71</sup>

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There is no meaningful difference between saying that the government is equitably estopped from raising the statutory cutoff date and disregarding the cutoff date as a matter of equity. The panel substitutes words for concepts.

....  
All of that having been said, one might nevertheless be inclined to overlook the panel's errors. The result it reaches is appealing; the fact situation is somewhat unusual; the precise issue may never arise again. There is a strong temptation, therefore, to treat the decision as a sport, unworthy of further thought or concern.

... These issues, tucked away almost as an afterthought in the panel's conclusion, promise to be the opinion's most troublesome aspect, far transcending the case of these Filipino war veterans. What the panel has done goes to the very heart of our jurisprudence and will sow no end of mischief if followed as precedent.<sup>72</sup>

The question of whether the court is right in invoking its equity powers turns out to be important because of the liberties the panel takes once it deems itself freed from the constraints of a court sitting at law. If equity can do all that the panel here says it can, courts must surely be far more cautious in asserting its authority.<sup>73</sup>

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71. *United States v. Balough*, 820 F.2d 1485, 1491 (9th Cir. 1987) (Kozinski, J., concurring).

72. *Pangilinan v. Immigration & Naturalization Service*, 809 F.2d 1449, 1452 (9th Cir. 1987) (Kozinski, J., dissenting from denial of rehearing en banc), *rev'd*, 486 U.S. 875 (1988).

73. *Id.* at 1453 (citation omitted).

If *Fedorenko* can be distinguished, the panel fails to do so, apparently relying on its equity powers to shrug off a categorical directive from the Supreme Court. But it does not, in my view, serve the orderly development of law in this circuit to deny apparently controlling Supreme Court authority so much as a nod of acknowledgement.

[T]he panel trips lightly over the question of how a court, whether sitting in law or equity, can breathe life into a statute 40 years dead.<sup>74</sup>

#### *D. Puns*

On construing the State of Virginia's law of contracts:

The answer to the question presented in this appeal is, yes, Virginia, there *is* a parol evidence rule.<sup>75</sup>

\* \* \* \*

The facts that spawned this controversy are relatively straightforward. Defendants Alexander and Peele are Haida Indians. Peele harvested over half a ton of herring roe on kelp in Southeastern Alaska and enlisted Alexander's help in selling it. However, they had permits for only 444 pounds. Undeterred, they loaded an old Dodge station wagon to the gills with the contraband and trawled Canada for a buyer. Their plan began to flounder when they were unable to hook a buyer and the herring roe began to rot. They then attempted to enter the United States, hoping to unload their now malodorous cargo in the state of Washington. Alerted by Canadian officials, United States Customs agents snared the purloiners of prenatal pisces. Defendants were charged with violating the Lacey Act, which makes it illegal to transport in interstate or foreign commerce any fish or wildlife taken or sold in violation of state law. 16 U.S.C. § 3372(a)(2)(A). The jury convicted and defendants appeal.<sup>76</sup>

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74. *Id.* at 1454.

75. *Wilson Arlington Co. v. Prudential Ins. Co.*, 912 F.2d 366, 367 (9th Cir. 1990) (construing Virginia Law).

76. *United States v. Alexander*, 938 F.2d 942, 944-45 (9th Cir. 1991) (footnote omitted).

Suspect that giant film distributors like Columbia, Paramount and Twentieth Century-Fox had fallen prey to Raymond Syufy, the canny operator of a chain of Las Vegas, Nevada, movie theaters, the United States Department of Justice brought this civil antitrust action to force Syufy to disgorge the theaters he had purchased in 1982-84 from his former competitors. . . . The Justice Department nevertheless remains intent on rescuing this platoon of Goliaths from a single David.<sup>77</sup>

### *E. Ethics of Journalism*

Truth is a journalist's stock in trade. To invoke the right to deliberately distort what someone else has said is to assert the right to lie in print. To have that assertion made by *The New Yorker*, widely acknowledged as the flagship publication when it comes to truth and accuracy, debases the journalistic profession as a whole. Whatever it might have taken to refute Masson's allegations on the merits is not, in my view, worth the unsettling implications left by defeating him on these grounds. Masson has lost his case, but the defendants, and the profession to which they belong, have lost far more.<sup>78</sup>

Unlike my colleagues, I am unable to construe the first amendment as granting journalists a privilege to engage in practices they themselves frown upon, practices one of our defendants has flatly disowned as journalistic heresy. The press can legitimately claim the right to editorial judgment when it is selecting the words itself; it cannot, and does not, claim the right to select words for others.<sup>79</sup>

### *F. On Contracts*

Judge Kozinski actually believes contracts mean what they say, and say what they mean:

Once again, we consider whether a contract is an instrument

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77. United States v. Syufy Enters., 903 F.2d 659, 661 (9th Cir. 1990). For the official listing of all 215 movie titles in *Syufy*, see *The Syufy Rosetta Stone*, 1992 B.Y.U. L. REV. 457.

78. Masson v. New Yorker Magazine, Inc., 881 F.2d 1452, 1486 (9th Cir. 1989) (Kozinski, J., dissenting), *rev'd*, 111 S.Ct. 2419 (1991).

79. *Id.* at 1478 (citation omitted).

by which parties can define their rights and responsibilities by mutual agreement, or a platform for judicial policymaking.<sup>80</sup>

To recite such reasoning is to criticize it. The idea that a party may not rely on a contract term because the other side can be expected to violate it cuts at the very heart of contract law. Contracts enable parties to define their mutual rights and responsibilities; they are useful only insofar as each side can count on being able to hold the other to the terms of the agreement. If a contract provides anything at all, then, it is the reasonable expectation that the parties will fulfill their obligations, either voluntarily or under judicial compulsion. For a court to deny enforcement of a contract term because breach is foreseeable defeats the purpose of having a contract, effectively withdrawing that particular issue from regulation by mutual assent.

The dangers of the *Allstate/Financial Indemnity* approach are manifold. In the first place, it forces a wealth transfer from those who respect the terms of their agreements to those who do not. . . . But these benefits do not appear as manna from heaven; like all other economic advantages, someone has to pay for them. Under these circumstances, insurance companies foot the bill, but only until they can raise their rates to cover the additional risk. Automobile renters thus wind up paying for the implied permittee term whether they want it or not; those who respect the terms of their contract wind up subsidizing the renegers. As is often the case with judicially created rules that adjust contract rights on an ad hoc basis, an implied permittee term favors the careless, the irresponsible, the crafty, the unscrupulous at the expense of those who live up to their contractual responsibilities.<sup>81</sup>

As a matter of experience, breach is a relatively common occurrence in the marketplace . . . . It is therefore "foreseeable and inevitable," to quote *Allstate*, that a significant portion of all contracts will be violated. Applying the rationale of *Allstate* and *Financial Indemnity*, one would have to conclude that virtually all commercial agreements are unenforceable because the contracting parties will be deemed to have con-

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80. *Travelers Ins. Co. v. Budget Rent-A-Car Systems*, 901 F.2d 765, 766 (9th Cir. 1990).

81. *Id.* at 768 (citations omitted).

sented to every "foreseeable and inevitable" breach.

This is total nonsense, of course; no court would take the reasoning of these cases to its logical conclusion. Yet there is nothing in principle that distinguishes *Allstate* and *Financial Indemnity* from the examples we have given; it all turns on the gut feeling of the judge who happens to be applying the law. Cases like *Allstate* and *Financial Indemnity* are particularly pernicious, therefore, because they give courts a roving commission to nullify or rewrite contract terms they don't like, and to do so without bothering to rely on established principles of contract law.<sup>82</sup>

Insurance companies and other institutional litigants are frequently heard to complain that courts undermine commercial transactions by refusing to apply contract terms as the parties agreed to them. As often as not, however, courts adopt these positions at the urging of these very litigants, who, for one reason or other, find it in their short-run interest to press such arguments.<sup>83</sup>

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This case provides a textbook example of how equitable doctrines, developed by the courts in an effort to avoid fraud and oppression, can be manipulated to achieve fraud and oppression. In allowing the parties to undermine the finality of a facially unconditional transfer in *Kawauchi*, the Hawaii Supreme Court no doubt hoped to achieve a fairer result, consistent with the widespread notion that justice will be served if only parties are allowed to explain their undocumented intentions and reservations.

What the court might have overlooked, however, is the unfairness that can flow from the necessity of litigating a claim such as Ellis's. When parties are allowed to undermine the finality of written instruments, every transaction can be held hostage to competing claims as to what might have been said or believed by any of the participants. Moreover, disregarding the plain language of a deed or contract may, as in this case, enable a party to enter the transaction with the intent "to ensnare, entrap, and defraud." In any event, litigating such claims, no matter how legitimate, is expensive, time-consuming and nerve-racking.

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82. *Id.* at 769.

83. *Id.* at 771.

While holding parties to the words of their written instruments may result in an occasional unfairness, it certainly avoids the type of delay, unfairness and expense generated in this case. Suffice to say that, but for the *Kawauchi* rule, this case would have been over in 1982, or sooner. On balance, we believe that the far wiser, as well as fairer, rule is one which puts parties on notice that they will be bound by the terms of the instruments they sign.<sup>84</sup>

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The right to enter into contracts—to adjust one's legal relationships by mutual agreement with other free individuals—was unknown through much of history and is unknown even today in many parts of the world. Like other aspects of personal autonomy, it is too easily smothered by government officials eager to tell us what's best for us. The recent tendency of judges to insinuate tort causes of action into relationships traditionally governed by contract is just such overreaching. It must be viewed with no less suspicion because the government officials in question happen to wear robes.<sup>85</sup>

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*Pacific Gas* casts a long shadow of uncertainty over all transactions negotiated and executed under the law of California. As this case illustrates, even when the transaction is very sizeable, even if it involves only sophisticated parties, even if it was negotiated with the aid of counsel, even if it results in contract language that is devoid of ambiguity, costly and protracted litigation cannot be avoided if one party has a strong enough motive for challenging the contract. While this rule creates much business for lawyers and an occasional windfall to some clients, it leads only to frustration and delay for most litigants and clogs already overburdened courts.

It also chips away at the foundation of our legal system. By giving credence to the idea that words are inadequate to express concepts, *Pacific Gas* undermines the basic principle that language provides a meaningful constraint on public and private conduct. If we are unwilling to say that parties, deal-

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84. *In re Corey*, 892 F.2d 829, 838 n.6 (9th Cir. 1989).

85. *Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 316 (9th Cir. 1989) (Kozinski, J., concurring).



ing face to face, can come up with language that binds them, how can we send anyone to jail for violating statutes consisting of mere words lacking "absolute and constant referents"? How can courts ever enforce decrees, not written in language understandable to all, but encoded in a dialect reflecting only the "linguistic background of the judge"? Can lower courts ever be faulted for failing to carry out the mandate of higher courts when "perfect verbal expression" is impossible? Are all attempts to develop the law in a reasoned and principled fashion doomed to failure as "remnant[s] of a primitive faith in the inherent potency and inherent meaning of words"?

Be that as it may. While we have our doubts about the wisdom of *Pacific Gas*, we have no difficulty understanding its meaning, even without extrinsic evidence to guide us. As we read the rule in California, we must reverse and remand to the district court in order to give plaintiff an opportunity to present extrinsic evidence as to the intention of the parties in drafting the contract. It may not be a wise rule we are applying, but it is a rule that binds us.<sup>86</sup>

\* \* \* \*

Written instruments, fixing the parties' rights and responsibilities by mutual consent, bring an important measure of order to life and greatly facilitate the adjudicatory process. While interpreting contract language is not always easy, sticking to the words the parties actually used limits substantially the bounds of legitimate disagreement.<sup>87</sup>

But it is exceedingly difficult to know what parties *really* thought many years back and virtually impossible to divine what they *would* have thought had they but known something they did not.<sup>88</sup>

At root, this case is about the respect the law ought to accord agreements between private parties. Despite recent cynicism, sanctity of contract remains an important civilizing concept. . . . It embodies some very important ideas about the nature of human existence and about personal rights and responsibilities: that people have the right, within the scope of what is

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86. *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 569-70 (9th Cir. 1988) (footnotes omitted).

87. *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1459 (9th Cir. 1988).

88. *Id.* at 1460.

lawful, to fix their legal relationships by private agreement; that the future is inherently unknowable and that individuals have different visions of what it may bring; that people find it useful to resolve uncertainty by "mak[ing] their own agreement and thus designat[ing] the extent of the peace being purchased," that courts will respect the agreements people reach and resolve disputes thereunder according to objective principles that do not favor one class of litigant over another; and that enforcement of these agreements will not be held hostage to delay, uncertainty, the cost of litigation or the generosity of juries.<sup>89</sup>

Parties can never be sure about what the future will bring; they sign contracts for the very purpose of guarding against unforeseen contingencies.<sup>90</sup>

### G. *Statutory Interpretation*

Judge Kozinski also advocates the plain-meaning approach to statutory interpretation:

What the majority has done here does comport with a type of rough-and-ready frontier justice and may not seem terribly significant. But the implications of the decision are quite profound.<sup>91</sup>

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When courts take it upon themselves to improve upon statutory language, they often buy themselves a lot of trouble that may not be immediately obvious . . . I predict that [this decision] will quietly breed its own jurisprudence, calling upon us to determine what kinds of circumstances are "highly unusual" enough to emancipate us from statutory strictures. For the benefit of the members of the bar who might try and guess how I will exercise this discretion, let the record reflect that I wear a 9½ wide.<sup>92</sup>

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89. *Id.* (citations omitted).

90. *Id.*

91. *United States v. Ray*, 920 F.2d 562, 568 (9th Cir. 1990) (Kozinski, J., dissenting).

92. *Id.* at 569.

As a linguistic matter, "and" and "or" are not synonyms; indeed, they are more nearly antonyms. One need only start the day with a breakfast of ham *or* eggs to be duly impressed by the difference.<sup>93</sup>

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[W]hen we allow ourselves to be guided by intuition that Congress didn't really mean what it said, we are no longer interpreting laws, we are making them.<sup>94</sup>

But this is not reliance on legislative history as I understand the term; it is clairvoyance. If we are free to make up the law based on our guess as to what Congress may have thought about a case it never thought of, we might as well dispense with statutes altogether and rely on ouija boards instead.<sup>95</sup>

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The two provisions have about as much in common as apples and pineapples: They sound vaguely similar but they grow on entirely different statutory trees.<sup>96</sup>

\* \* \* \*

The following comments on a notoriously murky statute caught the attention of Congress:<sup>97</sup>

No one who has had occasion to study the Limitation of Liability Act has been struck by its lucidity.<sup>98</sup>

Drafted with the same meticulousness as the original statute, the 1936 amendment failed to address the question presented to us today . . . .<sup>99</sup>

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93. *MacDonald v. Pan Am. World Airways, Inc.*, 859 F.2d 742, 746 (9th Cir. 1988) (Kozinski, J., dissenting).

94. *United States v. Phelps*, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from the denial of rehearing en banc).

95. *Id.* at 1284.

96. *Cubanski v. Heckler* 794 F.2d 540, 545 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc), *vacated as moot sub nom. Bowen v. Kizer*, 485 U.S. 386 (1988).

97. See S. REP. NO. 94, 101st Cong., 1st Sess. 4 (1989).

98. *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 235-36 (9th Cir. 1990) (footnote omitted).

99. *Id.* at 237.

As noted, the Limitation of Liability Act is unlikely to serve as a model of legislative draftsmanship. Because the question presented to us seems not to have been contemplated by the legislative drafters, we are now asked to distill more from the statute than Congress put into it.<sup>100</sup>

Missshapen from the start, the subject of later incrustations, arthritic with age, the Limitation Act has "provided the setting for judicial lawmaking seldom equalled."<sup>101</sup>

### H. Voting Rights

Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids.<sup>102</sup>

The only other way to explain the result in *Burns* is to assume that there is no principle at all at play here, that one person one vote is really nothing more than a judicial squinting of the eye, a rough-and-ready determination whether the apportionment scheme complies with some standard of proportionality the reviewing court happens to find acceptable. I am reluctant to ascribe such fluidity to a constitutional principle that the Supreme Court has told us embodies "fundamental ideas of democratic government."<sup>103</sup>

### I. Criminal Law and Procedure

Concluding that extracting blood from a drunk driving suspect violated the Fourth Amendment:

Surely, however, drunk driving is as serious a problem as many crimes that are labeled felonies, e.g., stealing \$400 of possessions from a corpse; impersonating a bride or bride-

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100. *Id.*

101. *Id.* at 239.

102. *Garza v. County of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).

103. *Id.* at 784 (footnote & citation omitted).

groom; or selling 1/10 of an ounce of marijuana.<sup>104</sup>

Cal.Pen.Code § 642 (West 1988) makes it a felony to commit grand theft from a dead person; under Cal.Pen.Code § 487 (West Supp. 1991), grand theft is the theft of possessions worth more than \$400. If those possessions happen to be avocados or crustaceans, \$100 worth will do; and if it's one of the listed farm animals, its value is immaterial. It follows that the nonconsensual removal of a goat from a corpse would be a felony in California.<sup>105</sup>

But I just can't imagine a case where the police need to administer a blood test in self-defense.<sup>106</sup>

That issue is governed by the Constitution, not the California Vehicle Code. We should not confuse one for the other.<sup>107</sup>

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There's a simple way for the police to avoid many complex search and seizure problems: Get a search warrant.<sup>108</sup>

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### Criticizing Ninth Circuit rulings interpreting the Sentencing Guidelines' downward departure for "acceptance of responsibility":

This requirement puts defendants like Aichele in a really tight box. . . .

. . . If a defendant like Aichele wants to be eligible for the two-level reduction for acceptance of responsibility, he must break his silence and tell the judge all about how he done the dirty deed and how sorry he is about it.

. . . [T]he prosecution would be entitled to retry the defendant, using as evidence his heart-felt confession and words of contrition.

. . . .

A defendant is thus put to a brutal choice between ob-

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104. *Hammer v. Gross*, 932 F.2d 842, 853 (9th Cir. 1991) (en banc) (Kozinski, J., concurring) (footnotes omitted).

105. *Id.* at 853 n.3 (citation omitted).

106. *Id.* at 853.

107. *Id.* at 854 n.6.

108. *United States v. Harper*, 928 F.2d 894, 895 (9th Cir. 1991).

taining a shorter sentence and giving up his right to appeal, and preserving intact his right to appeal but giving up the opportunity to plead for a more lenient sentence. I realize that criminal trials are not for the faint of heart and that criminal defendants often must choose among unpalatable alternatives but this, it seems to me, goes too far.<sup>109</sup>

Presumably a defendant could try to obtain an acquittal by protesting his innocence and then later come clean and bow and scrape before the district judge in seeking a reduced sentence. It would be tough but, one might maintain, it would not be impossible. The limit of this logic too seems to be reached where it becomes impossible to obtain the sentence reduction *and* preserve the right to an effective appeal.<sup>110</sup>

I agree with my colleagues that we cannot simply give defendant the benefit of the two-level reduction without requiring that he subject himself to the self-flagellatory ritual contemplated by the Guidelines; even then the district judge would have to exercise his discretion whether or not to grant the reduction. All of this, of course, is beyond our competence.<sup>111</sup>

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In a case involving a prosecutor, Carter, who testified for the government:

Carter stopped just short of pinning a Boy Scout Merit Badge on Silverman [a key government witness].<sup>112</sup>

Cases like this one put defense lawyers in a real dilemma: How far can you go toward impeaching the prosecution's witness before you find yourself Carterized, as happened here? If normal impeachment of a prosecution witness—which sometimes involves suggestions that the witness might be fibbing—gives an excuse for putting the prosecutor on the stand to tell just how upright the witness really is, criminal trials will be reduced to a credibility contest between the

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109. *United States v. Aichele*, 941 F.2d 761, 768 (9th Cir. 1990) (Kozinski, J., dissenting in part).

110. *Id.* at 769.

111. *Id.* at 770.

112. *United States v. Kenney*, 911 F.2d 315, 323 (9th Cir. 1990) (Kozinski, J., dissenting).

prosecutor and the defendant.<sup>113</sup>

Here, the prosecutor should have refrained from offering himself as a witness; failing that, the district court should have rejected his testimony; failing that, the district court should have limited his testimony to direct rebuttal of matters raised by the defense; failing that this court should reverse Kenney's conviction. I fear that all of these successive failings have denied Kenney a fair trial. I must dissent.<sup>114</sup>

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In a case in which the defendant, Phelps, traded a gun for drugs, the majority held that the offense did not involve the use of a firearm. Judge Kozinski disagreed:

Mark Phelps was a man with a problem: He was in the business of manufacturing illegal drugs, but he just couldn't get his hands on a commercial quantity of Ephedrine, a restricted precursor of methamphetamine.<sup>115</sup>

Phelp's dog-and-pony show was a hit; the men were fascinated by the gun. But when they asked Phelps how much he wanted for it, he told them it wasn't for sale—unless they agreed to supply Ephedrine, in which case he would give them the machine gun and silencer for free.<sup>116</sup>

The panel's refusal to apply the statute to a fact situation squarely covered by the clear statutory language, and the full court's failure to correct the error, raise a fundamental question: Is there any law that the courts cannot circumvent through creative "interpretation"? The answer apparently is no. If the phrase "during and in relation to any . . . drug trafficking crime" can be construed as excluding the situation where a drug manufacturer brings an automatic weapon and ammunition to a place where a drug deal is going down, offers to load the gun and shoot it, and the gun serves as the bait that makes the deal click, it is difficult to imagine *any* statutory language that a court cannot construe out of existence, based simply on its own gut feeling that this is not

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113. *Id.*

114. *Id.*

115. *United States v. Phelps*, 895 F.2d 1281, 1282 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc).

116. *Id.*

what Congress had in mind.<sup>117</sup>

The MAC 10, suddenly transmogrified into an offensive weapon, was still in his possession; Phelps opened fire and shot a deputy sheriff. . . . While the shooting of the deputy sheriff forms the basis of a separate state conviction and was considered here only during sentencing, it demonstrates as vividly as anything can that drug dealers are in a constant state of war with civilized society, making them extremely dangerous when armed.<sup>118</sup>

For a close-up look at the MAC 10 in action, see *Betrayed* (United Artists 1988), widely available on videocassette.<sup>119</sup>

If resort to legislative history is appropriate at all under these circumstances, it is this over-riding reality that should guide us—not a stray comment in a footnote of an irrelevant committee report, a comment that has nothing at all to do with this case.<sup>120</sup>

By reversing Phelp[s'] section 924(c) conviction on this record, the panel cuts a large hole deep into the heart of the statute. . . . Under this dangerous new theory, hardened criminals like Phelps can run a drug manufacturing plant and an armory on the same premises and escape punishment under § 924(c) by claiming that the guns were merely stock-in-trade.<sup>121</sup>

\* \* \* \*

This case involved a government informant named Miller:

Miller was a prostitute, heroin user and fugitive from Canadian justice; but otherwise she was okay.<sup>122</sup>

Throughout the investigation, Miller engaged in pastimes unbecoming someone on the federal payroll: prostitution, heroin use and shoplifting.<sup>123</sup>

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117. *Id.* at 1283.

118. *Id.* at 1288 n.4.

119. *Id.* at 1285 n.1.

120. *Id.* at 1286.

121. *Id.* at 1290.

122. *United States v. Simpson*, 927 F.2d 1088, 1089 (9th Cir. 1991).

123. *Id.*



\* \* \* \*

It turns out that Adrian was not only a drug-dealer, but also a messy housekeeper.<sup>124</sup>

David and Adrian were arrested and placed in a police car. Unbeknownst to them, the police activated a tape recorder in the car's trunk. While David and Adrian kept themselves busy discussing their circumstances and making incriminating statements, the police obtained a warrant to remove and open the safe.<sup>125</sup>

\* \* \* \*

Liberty—the freedom from unwarranted intrusion by government—is as easily lost through insistent nibbles by government officials who seek to do their jobs well as by those whose purpose it is oppress; the piranha can be as deadly as the shark.<sup>126</sup>

\* \* \* \*

To be sure, from the point of view of law enforcement authorities, such a procedure may have disadvantages. But the same can be said of the Bill of Rights.<sup>127</sup>

\* \* \* \*

The dissent is in the awkward position of maintaining that the sixth amendment makes a distinction which is invidious under the standards of the fifth.<sup>128</sup>

### *J. RICO*

If Berkeley, California, was the last bastion of sixties counterculture, Barrington Hall, the city's oldest and largest student housing co-operative, was surely the last rampart. While

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124. *United States v. Harper*, 928 F.2d 894, 895 (9th Cir. 1991).

125. *Id.* at 896.

126. *United States v. \$124,570 U.S. Currency (Campbell)*, 873 F.2d 1240, 1246 (9th Cir. 1989) (citations omitted).

127. *United States v. Nates*, 831 F.2d 860, 867 (9th Cir. 1987) (Kozinski, J., dissenting).

128. *United States v. Sahhar*, 917 F.2d 1197, 1206 n.10 (9th Cir. 1990).

much of Berkeley became stuffy and conventional, the residents of Barrington Hall clung to their freewheeling ways. A bit too freewheeling, according to two of Barrington's neighbors. They claim that the co-op's denizens engaged in massive drug-law violations, turning the neighborhood into a drug-enterprise zone. This, they allege, interfered with the use and enjoyment of their property. We consider whether they state a claim under RICO, 18 U.S.C. §§ 1961-1968.<sup>129</sup>

Barrington Hall's reputation was larger than life, even by California standards. Known across the country as a "drug den and anarchist household," Barrington Hall prided itself on fostering alternative lifestyles. Its bizarre and irreverent rituals included nude dinners with themes like Satan's Village Wine Dinner and the Cannibal Wine Dinner—the latter complete with body-part shaped food. "It was hard on us vegetarians," sniffed one former resident.<sup>130</sup>

These bacchanalian festivals often turned riotous. Objects, ranging from bottles to clothes dryers, were thrown out of the building into the yards and homes of neighbors. And in keeping with the counterculture motif, drug use and distribution were common: Plaintiffs allege that no fewer than 19 different enterprises and individuals—with colorful names like "Mushroom Dave," "Icepick Al," "Onngh Yanngh," and "Marybeth (a.k.a. Scarymeth)"—used Barrington Hall as a base for dealing drugs such as LSD, heroin and methamphetamine.

Even as Berkeley gentrified and grew more conservative, Barrington Hall remained "a place where revolutionary expression was encouraged and often taken to the extreme." Barrington Hall was, according to the graffiti on its walls, "An Oasis of Madness in a World Gone Sane."

The neighbors were not amused. They blame Barrington Hall for all sorts of social problems, including crime and litter. They also claim that the co-op's residents conducted drug deals and posted look-outs in front of plaintiffs' apartments, bothering them and making it look like they, too, were dealing drugs; and that Barrington's residents, to avoid publicity and conceal their illegal activity, regularly dumped the bodies of persons suffering drug overdoses onto the sidewalks near neighboring apartments.

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129. *Oscar v. University Students Co-op Ass'n*, 939 F.2d 808, 809 (9th Cir. 1991) (footnote omitted), *reh'g en banc granted*, 952 F.2d 1566 (9th Cir. 1992).

130. *Id.* at 809-10 (citations omitted).

Two neighbors, plaintiffs Ruth Oscar and Charles Spinosa, filed this suit, charging that the drug-dealing constituted a racketeering enterprise which injured their property. They asked for triple damages under RICO plus recovery on an assortment of pendent state claims. Barrington Hall itself has since gone the way of love-ins and strawberry wine . . . . But this suit remains, proving once again that there is strife after death.<sup>131</sup>

Plaintiffs blame the occupants of Barrington Hall for a multitude of misdeeds, from assault to vandalism; their complaint reads more like an enumeration of the ten plagues than a pleading in federal court.<sup>132</sup>

Plaintiffs' injury is conceptually no different than if a portion of their apartments had been flooded or damaged by fire. It would be possible, in either of these cases, to characterize the injury as merely psychic. The lessees are still entitled to live there; they just won't enjoy it as much. Indeed just about any injury to property (except theft of the property itself) could be characterized the same way: You still own the pile of scrap metal lying by the side of the freeway, but you won't derive the same pleasure from it as when it was a brand-new Maserati.<sup>133</sup>

Thus, RICO entitles the owner of the Maserati to recover triple the value of the ruined car; but it gives him nothing for the pain and suffering of having watched his dream machine reduced to a heap of rubble.<sup>134</sup>

### K. Civil Procedure

Yes, we are indeed holding that the Department has waived its right to argue that CEMS waived its right to ask for a waiver of repayment.<sup>135</sup>

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131. *Id.* at 810 (citations omitted).

132. *Id.* at 813. "Apparently plaintiffs were unable to come up with any injuries or crimes that begin with the letters w, x, y, and z." *Id.* at n.6.

133. *Id.* at 812.

134. *Id.*

135. *Chicano Educ. and Manpower Serv. v. United States Dep't of Labor*, 909 F.2d 1320, 1328 n.5 (9th Cir. 1990).

This case is dead, procedurally as well as substantively. By breathing new life into it, my colleagues create much business for the lawyers but ill-serve the interests of the parties and the cause of sound judicial administration.<sup>136</sup>

The Federal Rules of Civil Procedure are clear as mountain spring water . . . .<sup>137</sup>

That issue is governed by Rule 8(a)(3), which has a much lower number because it comes into play long before Rule 54(c).<sup>138</sup>

If Rule 54(c) automatically cures any and all failures to state a prayer, Rule 8(a)(3) becomes nothing more than friendly advice.<sup>139</sup>

My colleagues leap over two hurdles with a single bound by also ignoring the rule that claims may not be raised for the first time on appeal.<sup>140</sup>

If Z Channel, a well-heeled litigant represented by one of the giants of the antitrust bar, is not bound by its litigation choices, who is?<sup>141</sup>

The majority engages in judicial necromancy yet again when it resurrects a substantive theory Z Channel long ago let expire, bringing this case back from the dead not once but twice.<sup>142</sup>

Once in a while big, interesting, difficult cases implode, leaving nothing for us to decide. When this happens, we should sweep aside the rubble, not compress it until it turns into a judicial black hole that sucks up productive resources of cosmic proportions. . . . This case is dead. R.I.P.<sup>143</sup>

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136. Z Channel Ltd. Partnership v. Home Box Office, Inc., 931 F.2d 1338, 1345 (9th Cir. 1991) (Kozinski, J., dissenting).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1346.

142. *Id.*

143. *Id.* at 1349.

It is our responsibility to answer the question fairly presented to us by the litigants, not one we might prefer they had asked. Because the majority comes up with the right answer to the wrong question, I must dissent.<sup>144</sup>

The majority's attempt to find safety between the pendulum of preemption and the pit of unlawful discrimination is simply unavailing.<sup>145</sup>

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Dissenting from an order certifying a question to a state supreme court:

The "better policy" in such circumstances is for the Arizona Supreme Court to just say no.<sup>146</sup>

\* \* \* \*

At the heart of the court's analysis is the notion that to allow White to relitigate his case before a jury would work an injustice. I am not convinced; as I see it, the injustice lies in the court's decision today, a decision that denies plaintiff the benefit of a precedent he was entitled to rely on. *Palmer*, decided nine years ago, established the law of the circuit long before this case was filed. White, acting pro se, discharged fully his responsibility under the Federal Rules of Civil Procedure and the law of this circuit in securing his right to a jury. Defendant, at all times represented by counsel, was on notice of plaintiff's request for a jury trial; elementary research would have disclosed that White's seventh amendment right was not waivable by acquiescence or mute assent. Defendant, no less than plaintiff, could have brought this to the attention of the district court and objected to the conduct of a bench trial. He did not. While I assume this was the result of inadvertence rather than calculation, it is nonetheless hard to conclude—as the majority and concurrence do—that the fault was entirely plaintiff's and that he should therefore pay for the district court's error by forfeiting his constitutional right

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144. *Livadas v. Aubry*, 943 F.2d 1140, 1147-48 (9th Cir. 1991) (Kozinski, J., dissenting).

145. *Id.* at 1149.

146. *Carroll v. United States*, 923 F.2d 752, 754 (9th Cir. 1991) (Kozinski, J., dissenting) (citation omitted).

to trial by jury.<sup>147</sup>

Most likely, what we have here is an oversight by all concerned. The question is, who should pay for this mutual mistake? I have much difficulty concluding it should be the party who did exactly what the law required of him.<sup>148</sup>

### *L. Administrative Law*

But words on paper do not become legislative regulations merely because the Secretary could have promulgated them as such; he must actually have done so. The Secretary, however, denies doing any such thing, and all available evidence supports his claim.<sup>149</sup>

I had thought it firmly established that a court may not roam through the vast libraries of federal agency publications, borrowing from those it likes and ignoring the rest.<sup>150</sup>

Lawyers in the nine western states will now have a field day prospecting for other such nuggets within the thousands of pages of internal instructions issued by agencies regulating vast areas of the law: tax, personnel, transportation, agriculture, the environment, to name a few.

Having created uncertainty where stability is vital, the panel's methodology will breed litigation which will then beget further uncertainty. While this may be a bonanza for lawyers, and give immense power to courts to meddle in the affairs of the Executive Branch, it will cause no end of headaches for agency officials who will now have to guess which of their informal, unsigned, internal guidelines will be found "exceptional" enough to outrank regulations. That door, it seems to me, was slammed shut by the Supreme Court in cases such as *Schweiker v. Hansen* and *Federal Crop Insurance v. Merrill*. It should remain that way.<sup>151</sup>

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147. *White v. McGinnis*, 903 F.2d 699, 706-7 (9th Cir. 1990) (en banc) (Kozinski, J., dissenting).

148. *Id.* at 707 n.2.

149. *Cubanski v. Heckler*, 794 F.2d 540, 542-43 (9th Cir. 1986) (Kozinski, J., dissenting from the denial of rehearing en banc), *vacated as moot sub nom. Bowen v. Kizer*, 485 U.S. 386 (1988).

150. *Id.* at 544.

151. *Id.*

In order to find fault with the Secretary's action, the panel tells the Secretary that he acted with motives he denies having and pursuant to statutory powers he denies exercising. Such psychoanalysis of administrative decision-making far exceeds the bounds of judicial review.<sup>152</sup>

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"[E]xcess Pain" is a concept only a lawyer could love: vague, statutorily unsupported, metaphysically incongruous.<sup>153</sup>

Pain, however, like beauty, is entirely subjective; it is impossible to compare one person's suffering with that of another, much less determine the "correct" amount of pain someone should feel because of a particular impairment.<sup>154</sup>

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The next worst thing to having no insurance at all is having two insurance companies cover the same claim. In the absence of consistent coordination of coverage provisions, the two companies can dissipate months, even years, wrangling with one another, while the insured and the provider of the covered services are left holding the bag.<sup>155</sup>

### *M. Antitrust Law*

By finding that Syufy did not possess the power to set prices or to exclude competition, the district court removed the firing pins from the government's litigation arsenal. Without these essential elements, it can make out a violation of neither the Sherman nor Clayton Acts; its lawsuit collapses like a house of cards.<sup>156</sup>

It is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend

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152. *Id.* at 545.

153. *Bunnell v. Sullivan*, 947 F.2d 341, 351-52 (9th Cir. 1990) (en banc) (Kozinski, J., concurring in judgment).

154. *Id.* at 352 (citation omitted).

155. *PM Group Life Insurance Co., v. Western Growers Assurance Trust*, 953 F.2d 543, 544 (9th Cir. 1992).

156. *United States v. Syufy Enters.*, 903 F.2d 659, 671 (9th Cir. 1990).

limited taxpayer resources.<sup>157</sup>

### *N. Employment Law*

Working on an oil rig is dangerous business. It requires total concentration, precise timing, a fair degree of coordination and a significant amount of speed. Rig accidents can have disastrous consequences, ranging from severed limbs and multiple deaths to massive despoliation of the environment. It goes without saying that drug abuse has no place on oil rigs and that a company operating oil rigs has the right—indeed, the obligation—to take decisive action when it obtains reliable information that some of its employees may be abusing drugs while on duty.

This is the unhappy tale of a company that did just that. Company officials reasonably believed that three employees had used drugs on the job, not once but repeatedly. Two eyewitnesses fingered the drug-using employees; the company pursued the matter promptly, but not precipitously, obtaining confirmation from yet a third eyewitness before discharging the violators. The personnel action was taken in a balanced, detached, professional manner, free from any hint of rancor or personal animosity. Had the company acted less decisively, it would have betrayed its responsibility to other employees and the environment we all share. Yet when all is said and done, the fingered employees walk off with a cool third of a million dollars, while the company is left to pick up the tab, pay its lawyers and scratch its head wondering what it could have done differently. It is a question we all might ponder as we contemplate the bitter lesson of this cockeyed morality tale.<sup>158</sup>

In my view, the interest of everyone involved would have been better served had this dispute arisen in the context of a collective bargaining agreement, which would have provided an effective mechanism for dealing with the issues presented. I fear, however, that decisions such as these ill-serve the cause of voluntary unionization, shifting to the courts an increasing number of labor disputes that have traditionally been handled by union-sponsored grievance procedures. While

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157. *Id.* at 672 (footnote omitted).

158. *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 204 (9th Cir. 1990) (Kozinski, J., dissenting).



it is difficult to judge such matters, I suspect that a significant cause of the recent trend away from union membership may be the availability of judicial remedies that give employees the same—and sometimes superior—rights as those available under a collective bargaining agreement.<sup>159</sup>

Plaintiffs in our case, by contrast, were engaged in work so dangerous that a single slip could easily kill a co-worker or unleash an environmental catastrophe. In spite of this, Parker Drilling obtained no fewer than three eyewitness reports that plaintiffs were using drugs on the job before firing them. To wait any longer or look any closer would have been reckless; the dangers being what they were, the company had no responsible choice but to act decisively. By affirming the jury verdict against Parker, we are saying that management erred grievously by failing to send the employees back onto the oil rig after receiving three eyewitness reports that they were observed regularly abusing drugs on the job, and that the company must now pay hundreds of thousands of dollars for its mistake.

This strikes me as a result so preposterous it would be laughable if it were not so scary. Is this the type of decision we want to take out of the hands of management and give to a jury? Is it fair (or safe) to put company officials to a choice between risking environmental catastrophe and a crushing jury verdict? It seems to me that the most we can reasonably ask of managers under these difficult circumstances is that they act responsibly and in good faith.<sup>160</sup>

Call it common law or common sense, if there is a judicially created rule that allows juries to second guess all employee terminations, there ought to be a judicially created exception for situations where the employer moves quickly and in good faith to ensure the safety of its employees.<sup>161</sup>

If today's morality tale teaches anything, it is the wisdom of the aphorism: nice guys finish last. For its trouble, Parker Drilling is rewarded with a bill for \$360,107, years of litigation and a truckload of attorney time sheets. The moral of this story will not be lost on other, similarly situated, employers.

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159. *Id.* at 212 n.11.

160. *Id.* at 215.

161. *Id.* at 216 n.18.

Ideas have consequences and the ideas embodied in judicial opinions have very direct and immediate consequences. . . . The clear lesson of this case is that, unless the employee is caught red-handed by someone with authority to fire him, he can always manufacture a triable issue of fact by finding a few co-workers who never saw him using drugs, inventing some threat, or whatnot. And if a jury buys into the story, the courts will cheerfully uphold the award, no matter how little sense it makes in light of the record as a whole. It is difficult to say how many drug abusers will be permitted to remain on the job by litigation-timid managers, but there will surely be some.<sup>162</sup>

### O. *Miscellaneous*

All this proves is that, if you define the product market broadly enough, you can encompass any number of businesses, no matter how little they compete with each other. American Cab, American Airlines and American Motors all provide "transportation services," but no one is likely to call American Cab for a ride from New York to London; American Telephone & Telegraph and American Broadcasting Company both provide "mass communication services," but ABC cheerfully carries AT&T's advertising; the American Civil Liberties Union, the American Legion and the American College of Foot Surgeons are all fairly characterized as "public service organizations," yet I rather doubt the ACLU gets a lot of calls about podiatry. Most people know the difference between a bank and an insurance company; I doubt they will be confused just because my colleagues have come up with a term fuzzy enough to cover both institutions.<sup>163</sup>

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There are times when statutes, particularly those involving the collection of revenue, can work serious hardships. No one can blame government lawyers for pressing their client's rights under such circumstances. It is a wholly different matter, however, for government lawyers to ignore or bend the words of Congress in pursuit of an unconscionable result. To

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162. *Id.* at 217.

163. *American Int'l Group v. American Int'l Bank*, 926 F.2d 829, 835-36 (Kozinski, J., dissenting).

inflict the expense and uncertainty of litigation on citizens on such a tenuous basis is conduct unbecoming public servants and officers of the court. I can only hope that this matter will be brought to the personal attention of the Assistant Attorney General for the Tax Division, the United States Attorney for the Central District of California and the Chief Counsel of the Internal Revenue Service so that they may each take appropriate steps to avoid such overzealousness by their subordinates in the future.<sup>164</sup>

#### IV. CONCLUSION

The evidence is in. Instead of relying on *L.A. Law* and *Perry Mason*, we are going to get the public's opinion scientifically. Please register your view by filling out a photocopy of the following form and mailing it to the *BYU Law Review*.

#### Check All That Apply

- \_\_\_\_\_ I would like to see more judicial humor like Judge Kozinski's. Then maybe I could read a case (or law review article) without falling asleep.
- \_\_\_\_\_ Humor has no place in judicial opinions. (If you checked this line, you should also check the next line).
- \_\_\_\_\_ I am Humor Impaired. Where can I get some of those shorts mentioned in footnote 7?
- \_\_\_\_\_ I illegally photocopied this Comment. I am enclosing \$5.

*David A. Golden*

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164. *Newnham v. United States*, 813 F.2d 1384, 1387 (9th Cir. 1987) (Kozinski, J., concurring).